

Hon. Marsha Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

MARK HOFFMAN, on behalf of himself
and all others similarly situated,
Plaintiff,

v.

HEARING HELP EXPRESS, INC.,
TRIANGULAR MEDIA CORP.,
LEADCREATIONS.COM, LLC and
LEWIS LURIE,

Defendants.

CASE NO. 3:19-cv-05960-RBL

**DEFENDANT HEARING HELP
EXPRESS, INC.'S OPPOSITION
TO PLAINTIFF'S MOTION TO
STRIKE HEARING'S HELP
EXPRESS, INC.'S FOURTEENTH
AFFIRMATIVE DEFENSE**

ORAL ARGUMENT REQUESTED

DEFENDANT'S OPPOSITION TO MOTION TO STRIKE
FOURTEENTH AFFIRMATIVE DEFENSE -
No. 3:19-cv-05960-MJP

113461.00602/123964382v.7

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I. INTRODUCTION

Defendant Hearing Help Express, Inc. (“Defendant” or “HHE”) files this Opposition to Plaintiff Mark Hoffman’s (“Plaintiff” or “Hoffman”) *Motion to Strike Hearing Help Express, Inc.’s Fourteenth Affirmative Defense* (the “Motion”), [Dkt. No. 89]. As discussed, the Motion is misguided, prejudicial, and misconstrues the nature of the affirmative defense. HHE’s Fourteenth Affirmative Defense regarding its “good faith” and/or “reasonable reliance” on “prior express consent” obtained by a third-party is exactly the type of defense permitted in Telephone Consumer Protection Act (“TCPA”) cases such as this one. Moreover, the factual record is developed enough such that this issue can and will be brought on a motion for summary judgment. Accordingly, Plaintiff’s Motion should be denied as failing to satisfy the standard under Federal Rule of Civil Procedure 12(f) and as procedurally improper at this juncture.

II. STATEMENT OF FACTS

This putative class action arises from Plaintiff’s allegations that HHE violated the TCPA, 47 U.S.C. § 227, *et seq.* Plaintiff contends HHE: (1) placed non-emergency telephone calls using an automatic telephone dialing system (“ATDS”) or an artificial/prerecorded voice to his cellular telephone in violation of section 227(b)(1) of the TCPA; and (2) placed more than one phone solicitation call within a 12-month period to his cellular telephone number that has been on the Do Not Call (“DNC”) registry for at least 31 days in violation of section 227(c) of the TCPA. Plaintiff’s proposed class consists of four subclasses total, two subclasses as to HHE (*i.e.*, ATDS class and DNC class), and the same two subclasses but as to the other named Defendants, HHE’s lead generation vendor (and its owner and alleged related entity) who sold Plaintiff’s information to HHE. Dkt. No. 72, ¶ 43.

A. HHE Hired A Third-Party Lead Generator (Triangular) to Obtain Leads of Potential Customers that Provided Prior Express Consent.

HHE hired Defendant Triangular Media Corp. (“Triangular”)¹ to generate customer leads and worked with Triangular from June 2018 to October of 2019. *Declaration of Jim Houlihan* filed as Docket 41 (“Houlihan Dec.”), ¶¶ 4, 10. Critically, HHE did **not** hire Triangular to place any outbound telemarketing calls on its behalf. *Id.* ¶ 4. Instead, Triangular was hired to, and did, obtain leads for HHE using its automated and proprietary interactive voice response (“IVR”) system, which asks potential customers questions about whether they want to be contacted by various companies—only one of which is HHE—offering various products. *Declaration of Dana Lurie* attached as Exh. B to Docket 80 (“Lurie Dec.”), ¶¶ 2-6; *Houlihan Dec.*, ¶¶ 5-6. At the end of the IVR process, it asks if the person gives express consent to be called via an autodialed call, regardless of their status on any state or federal do not call list. *Lurie Dec.*, ¶ 6; *Houlihan Dec.*, ¶ 7. The only method by which Triangular was to obtain leads for HHE was through its IVR originating from commercials and direct mail where prospects would place an inbound call leading them to the IVR. *Houlihan Dec.*, ¶ 4.

Plaintiff admits he interacted with Triangular’s IVR prior to ever being called by HHE. Dkt. No. 72, ¶¶ 19-26. In this regard, Plaintiff alleges that during a June 13, 2019, call he was transferred to a prerecorded message (*i.e.*, the IVR) and concedes he answered several screener questions—which Plaintiff now contends he only did because he “wanted to know who had been calling him.” *Id.* ¶ 22. When Plaintiff interacted with the IVR, he responded “yes” when asked if he wanted a hearing specialist from Hearing Help to call him,² but then responded “no” at the end of the IVR when asked to give his express consent to be called using an autodialer. *Lurie Dec.*, ¶¶ 7-8; *Houlihan Dec.*, ¶¶ 6-8. However, there was a glitch in Triangular’s IVR process

¹ Plaintiff also named Lewis Lurie, “the owner and operator of Triangular Media” and Leadscreations.com LLC (“LeadCreations”), who “engaged in telemarketing conduct in this district for, or together with, Triangular Media in order to market Hearing Help products” as named Defendants. Dkt. No. 72, ¶¶ 12-14.

² This fact negates Plaintiff’s DNC claims. The TCPA allows calls to be made to persons whose phone numbers are on the national DNC registry where the person has made an inquiry and expressed interest in the business’ products and services, regardless of the form in which this inquiry was made. 47 USC § 227(b)(1)(C)(i).

that registered Plaintiff's "no" as a "yes." *Declaration of Gorgi Gorgiev* attached as Exh. C to Docket 80, ¶ 7-16; Lurie Dec., ¶¶ 7-8; Houlihan Dec., ¶¶ 6-8. Based on representations from Triangular, HHE understood all leads from Triangular, including Plaintiff, provided express consent under the TCPA and that only leads who responded "yes" to *both* the IVR question about HHE and the question at the end would be sold as a lead to HHE. Houlihan Dec., ¶ 9. HHE had no reason to believe any leads Triangular sold to HHE had not expressly consented to be called by HHE. *Id.*

B. HHE's Fourteenth Affirmative Defense.

On June 19, 2020, HHE filed an *Answer* to Plaintiff's First Amended Complaint. Dkt. No. 50. In that *Answer*, HHE asserted a Fourteenth Affirmative Defense for Good Faith and Reasonable Reliance. *Id.* at 20. Plaintiff did not file any Motion to Strike this same defense asserted in HHE's *Answer* to the First Amended Complaint.

After Plaintiff amended his complaint and filed a Second Amended Complaint to add an entity related to Triangular – LeadCreations, on September 25, 2020, HHE filed its *Answer* to the Second Amended Complaint. Dkt. No. 82. The affirmative defense at issue is as follows:

FOURTEENTH AFFIRMATIVE DEFENSE
(Good Faith and Reasonable Reliance)

Defendant at all times acted in good faith and within reasonable commercial standards as to the matters alleged in the SAC. Moreover, Defendant acted in good faith and reasonably relied on Triangular/LeadCreations, and any other lead generation vendor in their compliance with the TCPA in generating leads sold to Defendant. Triangular/LeadCreations, and all other lead generation vendors were to only provide leads to Defendant who provided express consent to be called. Triangular/LeadCreations and all other lead generation vendors provided assurances to Defendant that all leads transmitted to Hearing Help had given their express consent to be contacted by Defendant. Defendant reasonably believed only leads who provided consent to be called would be transmitted from Triangular/LeadCreations and the third-party lead generation vendors.

Dkt. No. 82 at 22. Although Plaintiff alleges no facts whatsoever as to other lead generator companies HHE hired to obtain leads, it asserts the proposed classes include everyone HHE called, regardless of the lead source. Thus, this affirmative defense is pled as to Triangular, as

well as “other lead generation vendors” who were also to only provide leads to HHE for people who expressly consented to be contacted.

C. The Motion to Strike.

On October 9, 2020, Plaintiff filed the Motion seeking to strike the Fourteenth Affirmative Defense. Dkt. No. 89. Plaintiff contends HHE cannot assert any affirmative defense that it “acted in good faith” or “reasonably relied” on Triangular to obtain the consent of leads it sold to HHE because “good faith” and “reasonable reliance” are not defenses under the TCPA. Mot. at 1. Plaintiff further argues that because TCPA is “essentially” a strict liability statute, HHE cannot assert its Fourteenth Affirmative Defense for Good Faith and Reasonable Reliance, except as to willful violations. Mot. at 3-4. Plaintiff is mistaken on both grounds.

III. STATEMENT OF THE ISSUES

Whether the Court should deny Plaintiff’s Motion and allow HHE to continue to assert the affirmative defense of “good faith” and “reasonable reliance” based on prior express consent obtained by a third-party where such a defense is permissible, and discovery is ongoing.

IV. AUTHORITY AND ARGUMENT

Federal Rule of Civil Procedure 8 provides “a party must affirmatively state any avoidance or affirmative defense.” FED. R. CIV. P. 8. Moreover, Federal Rule of Civil Procedure 12(f) provides that the “court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” FED. R. CIV. P. 12(f).

Courts in the Ninth Circuit have recognized “because of the limited importance of pleadings in federal practice and because motions to strike often needlessly extend litigation, broad motions to strike are generally disfavored.” *U.S. v. Gibson Wine Co.*, 2017 U.S. Dist. LEXIS 39820, at *5-6 (E.D. Cal. Mar. 20, 2017); citing *Andren v. Alere, Inc.*, 2017 WL 168605, *3 (S.D. Cal. Jan. 17, 2017); *Kratz Aerial Ag Service, Inc. v. Slykerman*, 2016 WL 1090361, at *2 (E.D. Cal. Mar. 21, 2017); (*Spring v. Fair Isaac Corp.*, 2015 WL 7188234, at *2 (E.D. Cal. Nov. 16, 2015)); *Atcherley v. Hanna*, 2016 WL 70028, at *1 (E.D. Cal. Jan. 6, 2016)). Such motions should not be granted “unless it is clear that the matter to be stricken could have no

possible bearing on the subject matter of the proceedings.” *Andren*, 2017 WL 168605 at *3; quoting *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991); *see also Park v. Welch Foods, Inc.*, 2014 WL 1231035, *1 (N.D. Cal. Mar. 20, 2014) (“Any doubt concerning the import of the allegations to be stricken weighs in favor of denying the motion to strike.”) (citation omitted).

In ruling on a motion to strike—much like a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss—a court must assume all the well-pled factual allegations of the complaint are true and view the pleading in the light most favorable to the pleader. *See Whittlestone*, 618 F.3d at 973 (“[C]ourts may not resolve ‘disputed and substantial factual or legal issues in deciding a motion to strike.’”); *Lexington Ins. Co. v. Energetic Lath & Plaster, Inc.*, 2015 WL 5436784, *11 (E.D. Cal. Sept. 15, 2015); *Patterson v. Two Fingers LLC*, 2015 WL 2345658, *3 (D. Ariz. May 15, 2015); *Holmes v. Elec. Document Processing, Inc.*, 966 F. Supp. 2d 925, 930 (N.D. Cal. 2013). A motion to strike does not test the substantive sufficiency of a pleading. *Yamamoto v. Omiya*, 564 F.2d 1319, 1327 (9th Cir. 1977) (“Rule 12(f) is neither an authorized nor a proper way to procure the dismissal of all or a part of a complaint.”) (citation and internal quotation marks omitted). Under this legal framework, HHE’s Fourteenth Affirmative Defense is neither “insufficient,” “immaterial” nor “impertinent”; rather, it bears directly on the “subject matter of the proceedings.” The Motion should be denied.

A. The Defense Asserted by Hearing Help Is a Valid Defense Under the Law and Should be Considered on a Motion for Summary Judgment.

It is well-settled that “[a]n affirmative defense is defined as a defendant’s assertion raising new facts and arguments that, if true, will defeat the plaintiff’s . . . claim, even if all allegations in the complaint are true.” *See Ahmed v. HSBC Bank USA, Nat’l Ass’n*, 2017 U.S. Dist. LEXIS 183910, at *5 (C.D. Cal. Nov. 6, 2017); *see also Joe Hand Promotions, Inc. v. Estradda*, 2011 WL 2413257, *1 (E.D. Cal. 2011) (observing that “an affirmative defense is not one where defendants claim that plaintiff has failed to state a *prima facie* case; rather, it is one that ‘precludes liability even if all the elements of the plaintiff’s claim are proven.’”).

1 First, by arguing “Hearing Help’s ‘good faith belief’ that it had permission to place the
 2 calls is insufficient to avoid liability under the TCPA,” (Mot. at 4), Plaintiff has unequivocally
 3 shown he, in fact, has “fair notice” of this defense—which is all that is required and satisfies the
 4 requirements under Federal Rule of Civil Procedure Rule 8. *Goldsby v. City of Henderson*
 5 *Police Dep’t*, 2019 WL 5963996, at *3 (D. Nev. Nov. 13, 2019) (denying motion to strike
 6 affirmative defenses because plaintiff had fair notice of each defense); *Harris v. Nationstar*
 7 *Mortg., LLC*, 2014 U.S. Dist. LEXIS 66346, at *8 (M.D. Fla. Apr. 23, 2014) (rejecting plaintiff’s
 8 allegation that defendant’s affirmative defense that any action was “was taken or omitted in
 9 good faith and in conformity with the . . . TCPA” should “be stricken as legally insufficient and
 10 invalid as a matter of law”; court held defendant’s assertions satisfied Rules 8(b) and (c) and
 11 denied plaintiff’s motion to strike).

12 Moreover, the assertion that the defense is not a recognized defense under the TCPA is
 13 wrong. Various courts in this Circuit—and elsewhere—have held “good faith” and/or
 14 “reasonable reliance” defenses can be part of the “prior express consent exception to the TCPA.”
 15 *Springer v. Fair Isaac Corp.*, 2015 U.S. Dist. LEXIS 154765, at *8 (E.D. Cal. Nov. 13, 2015).

16 For instance, in *Danehy v. Time Warner Cable Enters.*, 2015 U.S. Dist. LEXIS 125325,
 17 at *15-16 (E.D.N.C. Aug. 6, 2015), the court granted defendant summary judgment, holding:

18 Even assuming that the prior express consent of TWC’s Customer did not
 19 operate as consent by plaintiff, ***it is undisputed that defendant believed in***
 20 ***good faith not only that it did have consent to call the 704-421-6235***
 21 ***number, but also that the calls were being made for a service TWC’s***
 22 ***Customer had requested.*** Moreover, defendant acted reasonably based on
 23 its good faith belief. As noted, TWC’s Customer requested that defendant
 24 make a service visit to his home the day after he made the request. In
 25 response, a few calls were placed to the 704-421-6235 number on the
 26 evening before the visit was requested to occur and a few additional calls
 27 the following morning on the day of the requested visit. A message was
 left on the last call and the calls stopped. The 704-421-6235 number was
 called after the primary line was busy, in keeping with the TWC’s
 Customer’s designation of this number as secondary. Under the
 circumstances presented, ***defendant’s good faith belief that it had consent***
to call the 704-421-6235 number would make imposition of liability
under section 227(b) unjust.

1 *Id.* (emphasis added); *Degnen v. Dentis USA Corp.*, 2017 U.S. Dist. LEXIS 72491, at *8 (E.D.
 2 Mo. May 12, 2017) (declining to strike affirmative defense that defendant “has at all times acted
 3 in good faith and reasonable grounds for believing that they had not violated [the TCPA].”).³

4 In *Springer*, defendant’s “third affirmative defense of reasonable and good faith” stated:

5 Defendant’s actions were taken in good faith, in reliance upon information
 6 provided by its customers and others, and with a reasonable belief that
 7 such actions were legal, appropriate and necessary. The conduct alleged
 8 to be in violation of a statute, if any such conduct occurred, was purely
 unintentional, and occurred, if at all, despite Defendant’s reasonable and
 appropriate efforts to avoid any such violation.

9 *Springer*, 2015 U.S. Dist. LEXIS 154765, at *2. Like Hoffman, the plaintiff in *Springer*
 10 similarly moved to strike this affirmative defense “on the grounds that good faith affirmative
 11 defenses are not applicable to the TCPA because it is a strict liability statute.” *Id.* at *3; *compare*
 12 Mot. at 7-8 (arguing TCPA “imposes strict liability”). The defendant in *Springer* disagreed,
 13 arguing “a good faith affirmative defense that claims a prior express consent does apply to the
 14 TCPA.” *Id.* Notably, the Court also “[a]gree[d] with [d]efendant and . . . allow[ed] the third
 15 affirmative defense to stand.” *Id.* In so doing, the court took a middle-ground approach to this
 16 issue. There, the court observed “[d]efendant’s third affirmative defense alleges the possibility
 17 that it only called [p]laintiff in good faith reliance and belief ‘upon information provided.’” *Id.*
 18 The court further “interpret[ed] this statement to mean the [d]efendant is claiming the prior

19
 20 ³ In fact, at least one court in this Circuit has similarly dismissed TCPA claims where plaintiff’s actions with respect
 21 to one entity indicated a second entity could reasonably rely on her purported provision of consent. Specifically, in
 22 *Chyba*, the court dismissed plaintiff’s TCPA claims arising from collection calls by defendant where it had relied on
 information from the creditor, Enterprise, indicating plaintiff had provided her phone number to Enterprise, and
 23 thereby consented to be contacted. *Chyba v. First Fin. Asset Mgmt., Inc.*, 2013 U.S. Dist. LEXIS 165276 (S.D. Cal.
 Apr. 30, 2014), *aff’d*, 671 F. App’x 989 (9th Cir. 2016). There, the *Chyba* court observed:

24 Thus, although Plaintiff did not give consent directly to Defendant to call her cell phone
 25 number, ***it is sufficient that Defendant had a good-faith basis to believe that Plaintiff***
 26 ***had provided consent to the creditor on whose behalf Defendant sought to collect a***
debt. Even if Plaintiff is correct in stating that she never gave Defendant or Enterprise
 consent to call, and there was no ***actual*** prior consent from Plaintiff, Defendant is not
 liable for acting in good faith upon the information provided to it. This Court therefore
GRANTS summary judgment as to Counts II and III.

27 2013 U.S. Dist. LEXIS 165276, at *32-33 (first emphasis added). While HHE has not yet moved for summary
 judgment, it should still be permitted to continue to develop its “good faith” and “reasonable reliance” defenses.

28 DEFENDANT’S OPPOSITION TO MOTION TO STRIKE
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express consent exception to the TCPA. Because [d]efendant’s good faith defense is based on its assertion that there was prior express consent, the Court will allow [d]efendant to raise a prior express consent good faith defense.” *Id.* Based on this rationale, the court **denied** plaintiff’s motion to strike and held “[d]efendant is allowed to raise a good faith defense asserting prior express consent because such a defense is applicable to the TCPA.” *Id.* Nevertheless, the court clarified that its “ruling is not to be read as permitting a general good faith defense under the TCPA.” *Id.* And that the “defense is only permitted in so far as [d]efendant intends to argue that it had a good faith belief that prior express consent existed.” *Id.*

Here, as in *Springer*, HHE’s Fourteenth Affirmative Defense similarly states it: (a) “acted in good faith and reasonably relied” on its vendors to “only provide leads . . . who provided express consent to be called”; (b) received “assurances” that all leads had “given their express consent to be called”; and (c) “reasonably believed only leads who provided consent to be called” would be transmitted to HHE from these vendors. Dkt. No. 82 at 22. As a result, HHE’s Fourteenth Affirmative Defense is likewise “based on its assertion that there was prior express consent.” *Springer*, 2015 U.S. Dist. LEXIS 154765, at *3. Thus, even if this Court were unwilling to fully recognize a “general good faith defense”—which it need not do to decide this issue—the instant Motion should nevertheless be denied based on the several, independent reasons raised herein.

Lastly, in 2015, the Federal Communications Commission (“FCC”) noted that “the TCPA anticipates the caller’s ability to rely on ‘prior express consent,’ . . . and we interpret that to mean reasonable reliance, and the balancing we adopt herein reflects our construal of reasonable reliance.” *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961 (2015), fn. 312. While this safe harbor was overturned by the D.C. Circuit in *ACA International* (which, given its procedural posture, is binding within the Ninth Circuit), it was overturned only insofar as it applied to only the first call placed, and not to subsequent calls. *ACA Int’l v. Fed. Comm’n’s Comm’n*, 885 F.3d 687, 693 (D.C. Cir. 2018). Thus, while this “one call” safe harbor no longer exists under the FCC rules, the FCC’s

1 reasoning that prior express consent should be viewed with an eye toward reasonable reliance
 2 remains. Accordingly, Plaintiff's reliance on *N.L. v. Credit One Bank, N.A.*, and other case law,
 3 is misplaced.

4 **B. Plaintiff's Motion to Strike is Procedurally Improper.**

5 Plaintiff's attempt to strike the Fourteenth Affirmative Defense at this juncture is
 6 improper. This case was filed on October 9, 2019. Dkt. No. 1. Plaintiff then amended his
 7 *Complaint* on June 5, 2020. Dkt. No. 45. At that time, HHE asserted a "good faith" and/or
 8 "reasonable reliance" affirmative defense in its *Answer* to the *First Amended Complaint* based on
 9 its understanding that its vendor (*i.e.*, Triangular) had complied with the TCPA in generating
 10 leads sold to HHE. Dkt. No. 50 at 20. When Plaintiff again amended his pleadings, HHE
 11 asserted the *same* affirmative defense—but this time updated it to also include newly-identified
 12 defendant LeadCreations and "all other lead generation vendors." Dkt. No. 82 at 22. Discovery
 13 and the record support Hearing Help's defense.

14 Plaintiff has added three additional parties to this case since its inception. Additional
 15 parties may still be joined until December 31, 2020, and discovery is not set to close until April
 16 30, 2021, [Dkt. No 78]. "[S]uch a motion to strike should be denied if there is doubt whether the
 17 'challenged matter may raise an issue of fact or law . . . leaving the assessment of the sufficiency
 18 of the allegations for adjudication on the merits after proper development of the factual nature of
 19 the claims through discovery.'" *Cosper v. Veros Credit, LLC*, 2017 U.S. Dist. LEXIS 148540, at
 20 *13 (E.D. Cal. Sep. 12, 2017); citing *Springe.*, 2015 U.S. Dist. LEXIS 154765, at *4.

21 **C. Plaintiff Concedes the Fourteenth Affirmative Defense is Material and**
 22 **Pertinent to HHE's Alleged Willful Conduct and Treble Damages.**

23 Plaintiff next concedes, as he must, that the Ninth Circuit has not "directly" addressed the
 24 viability of good faith and/or reasonable reliance defenses. Mot. at 2. His subsequent citation to
 25 case law from several foreign circuits is thus unpersuasive and does not constrain this Court. *Id.*

26 Incredibly, Plaintiff then explains that those same foreign decisions have held "good faith
 27 error or mistake . . . impacts potential trebling damages for willful conduct." *Id.* This admission

is very significant. Indeed, it appears Plaintiff has forgotten that *this case* includes such an allegation of “willful conduct,” and similarly seeks “trebl[e] damages” of \$1,500 per call. *See Second Amended Complaint*, Dkt. No. 72 ¶ 48.c & p.11 (identifying as a “common question of law and fact” “[w]hether Defendants telephone calls were made knowingly or willfully,” and seeking an “[a]ward [of] \$1,500 in statutory damages for each and every call that Defendants willfully or knowingly placed in violation of . . . the TCPA.”). For this reason alone, and by Plaintiff’s own admission, HHE’s Fourteenth Affirmative Defense is directly material and pertinent to this case.

V. CONCLUSION

For the foregoing reasons, Hearing Help respectfully requests that the *Motion to Strike* Hearing Help Express, Inc.’s Fourteenth Affirmative Defense be denied.

DATED this 26th day of October, 2020.

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CERTIFICATE OF SERVICE

I, Nicole Metral, hereby certify that on October 26th, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following

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Signed at Los Angeles, California this 26th day of October 2020.

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DEFENDANT'S OPPOSITION TO MOTION TO STRIKE
FOURTEENTH AFFIRMATIVE DEFENSE - 11
No. 3:19-cv-05960-MJP

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